

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TED EARL ASH)	
Claimant)	
VS.)	
)	
BRADBURN WRECKING COMPANY, INC.)	Docket No. 259,884
Respondent)	
AND)	
)	
CALIFORNIA COMPENSATION INS. CO. and/or)	
WESTERN GUARANTY FUND)	
Insurance Carrier)	

ORDER

Claimant appealed the May 11, 2001 Order entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 18, 2001.

APPEARANCES

Kevin T. Stamper of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD

The record consists of the transcript from the November 28, 2000 preliminary hearing, the transcript from the January 23, 2001 preliminary hearing, and the transcript from the May 10, 2001 penalties hearing.

ISSUES

This is a claim for penalties arising from a November 28, 2000 preliminary hearing Order entered by Judge Clark. In order to understand the penalty issue presented on this appeal, the procedural history is important.

After conducting a preliminary hearing on November 28, 2000, in which neither respondent nor its insurance carrier appeared, the Judge granted claimant's request for medical benefits. The November 28, 2000 Order read:

1. The Claimant was injured out of and in the course of his employment with the Respondent on August 13, 2000 [sic].

2. Dr. Gagnon is authorized as the Claimant's treating physician. All medical is ordered paid.

Respondent and its insurance carrier appealed the November 28, 2000 Order to this Board. But before the Board issued its order, the Judge conducted a second preliminary hearing on January 23, 2001. At that hearing, respondent and its insurance carrier requested the Judge to terminate the benefits that had been awarded claimant on the grounds that claimant was not respondent's employee at the time of the August 13, 1999 accident. After listening to the additional evidence, the Judge concluded that respondent and its insurance carrier were correct. In a January 23, 2001 Order, Judge Clark granted the request to terminate claimant's preliminary hearing benefits. That Order was not appealed.

On March 27, 2001, the Board issued its decision affirming the November 28, 2000 preliminary hearing Order.

According to statements made by claimant's attorney at the May 10, 2001 penalties hearing, claimant made demand on respondent and its insurance carrier for the payment of benefits on April 6, 2001.

On May 11, 2001, Judge Clark entered an Order denying claimant's request for penalties. The Order read:

The Claimant's request for penalties is denied. The Claimant was not employed by the Respondent.

Claimant then brought this appeal. Claimant now contends the Judge erred by addressing the issue of whether claimant was respondent's employee on the date of accident. They argue that the Judge should not have disturbed the Board's March 27, 2001 finding that claimant was an employee of respondent as that issue was not before the Judge. In the alternative, claimant argues the greater weight of the evidence establishes that claimant was either an employee or a statutory employee of respondent at the time of his accident and, therefore, entitled to receive workers compensation benefits. Accordingly, claimant requests the Board to reverse the May 11, 2001 Order and award him penalties.

Conversely, respondent and its insurance carrier contend the May 11, 2001 Order should be affirmed. They agree with claimant that the application for penalties was the only issue presented to the Judge at the May 10, 2001 penalties hearing. Accordingly, they contend the application for penalties is the only issue to be addressed by the Board on this appeal and such application should be denied. Respondent and its insurance

carrier argue that claimant failed to prove that he satisfied the requirements of the penalty statute, K.S.A. 44-512a, as he allegedly failed to prove that he properly served the required 20-day demand letter or that the letter properly set out with particularity the medical bills that remained unpaid. They also argue claimant failed to present any evidence of which medical bills remained unpaid or even identified which were in issue.

The only issue before the Board on this appeal is whether claimant is entitled to receive penalties for the nonpayment of benefits ordered by the Judge in the November 28, 2000 preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, the Board finds and concludes:

The May 11, 2001 Order denying claimant penalties should be affirmed.

The Board agrees with respondent and its insurance carrier that penalties are not applicable. Claimant failed to prove that he complied with K.S.A. 44-512a by serving a 20-day demand letter upon respondent or its insurance carrier that set forth with particularity the unpaid medical bills in issue. Additionally, claimant failed to establish the amounts, if any, of the alleged unpaid medical bills, without which the amount of penalty cannot be determined. The Workers Compensation Act provides, in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in **an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill**, if: (1) **Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record;** and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.¹ (Emphasis added.)

¹ K.S.A. 44-512a(a).

The Board agrees with the parties that the issue whether claimant was an employee of respondent on the date of accident was not directly before the Judge at the May 10, 2001 hearing. Accordingly, the Judge's finding that claimant was not employed by respondent on the date of accident was dicta as it pertains to the request for penalties, although it does tend to explain the Judge's reason for terminating the preliminary hearing benefits in the January 23, 2001 Order.

AWARD

WHEREFORE, the Board affirms the May 11, 2001 Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director